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Supreme Court of the United States

October Term, 1974
No. 74-1025

BURTICE A. HINES, *et al.*,
Petitioners,
vs.
ANCHOR MOTOR FREIGHT, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Both the respondents Anchor Motor Freight, Inc. and The International Brotherhood of Teamsters attribute to petitioners an argument not made by them and then attack petitioners' integrity for attempting to raise a new claim for the first time in this Court (Anchor Brief, p. 33; I.B.T. Brief, p. 2). Typical of this attack upon a straw man is the International's characterization of petitioners' argument as:

> "petitioners' claim that the Joint Committee award should not be given final and binding effect even if they cannot prove their charge that the union breached its duty to represent them fairly." (I.B.T. Brief, p. 9).

Petitioners make no such contention! Rather, petitioners have urged throughout this litigation that proof of unfair representation by their union entitles petitioners to litigate their §301 claim against the employer notwithstanding the joint committee award (Petitioners' Brief, pp. 15-28). This is the rule suggested by *Vaca v. Sipes*, 386 U.S. 171 (1967) and urged by both union respondents in their respective briefs.[1]

Petitioners' contention regarding the defects of the joint grievance committee system is advanced only in the event this Court is disposed to reject the general rule suggested by *Vaca* in favor of a balancing of interests approach (Petitioners' Brief, p. 28), and then, not as an independent basis for relief, but as one factor among many to be weighed along with the unfair representation (Petitioners' Brief, pp. 29-36).[2]

The dominant theme of the respondent Anchor Motor Freight's Brief is its contention that it is unfair to penalize an innocent employer who at all times acted in good faith and that, therefore, petitioners can and should obtain all their relief from their union. It requires but brief reply to demonstrate that this claim is both legally and factually unsound.

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1. Petitioners welcome the belated conversion of both union respondents to this point of view for the first time in this Court.

2. Neither *General Drivers Local 39 v. Riss & Co.*, 372 U.S. 517 (1963) nor *Humphrey v. Moore*, 375 U.S. 335 (1964) are inconsistent with this approach, for in neither case did the union breach its duty of fair representation. Nor is a differential standard of finality inconsistent with the approach of the N.L.R.B. which, recognizing the dangers inherent in the joint committee system, declines to defer to its awards where evidence of union hostility suggests "that all members of the bipartite panel may be arrayed in common interest against the individual grievant." *Roadway Express, Inc.*, 145 N.L.R.B. 513, 515 (1963); *Youngstown Cartage Co.*, 146 N.L.R.B. 305, 308 n. 4 (1964).

ARGUMENT

Anchor's argument, employing terminology indigenous to the criminal law, such as "done no wrong," "innocent," "vindicated," and "exonerated," entirely misconceives the nature of petitioners' action against Anchor. Petitioners' claim against Anchor is not for violation of criminal law nor even for tort (as is their claim against the union for unfair representation), but rather for breach of contract under L.M.R.A. §301 (29 U.S.C. §185). Petitioners do not seek to punish Anchor for misconduct, but rather seek to be made whole for injuries suffered as a result of their discharge by Anchor in violation of the collective bargaining agreement.

If, indeed, petitioners are innocent of the dishonesty for which they were discharged (as the evidence overwhelmingly indicates and as it must be assumed on consideration of Anchor's Motion for summary judgment,[3] then Anchor would suffer no penalty nor harm of any

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3. Incredibly Anchor persists in its assertion of the petitioners' guilt long after motel clerk Anthony Pagano testified that the discrepancies between the amounts shown on the receipts submitted by petitioners for reimbursement and the lesser amounts recorded on the motel registration cards were wholly attributable to his having recorded the lesser amounts and personally pocketed the difference (R. 51-54). Anchor argues that "petitioners do not explain why the second Pagano statement is entitled to be treated as credible and his first statement, which was also made under oath, is not entitled to be believed" (Anchor Brief, p. 12). Apart from the fact that issues as to the credibility of witnesses are classically to be resolved by the jury and not by courts on motions for summary judgment, there are compelling reasons why Pagano's deposition testimony (R. 51-61) should be credited over his previous notarized statement obtained by Anchor (R. 180-186). The earlier notarized statement is a self-serving document which absolves Pagano of liability for cheating his employer and for receiving income unreported for tax purposes, by placing the blame on petitioners. Thus he had a substantial bias in the form of the motive of saving himself from criminal and civil liability. On the other hand, in his deposition testimony he admitted not only to larceny from his employer and tax fraud but also to having

(Continued on following page)

kind from an order reinstating the falsely accused petitioners. In fact, if Anchor's motive for petitioners' discharge were as represented, then the Company should be grateful to once again have the services of the highly-experienced petitioners.

With respect to petitioners' claim for back-pay, this Court has specifically held that the absence of proof of an employer's "bad faith" is not a sufficient reason for denying back-pay to innocent employees deprived of reinstatement or disadvantaged by an unfair labor practice, *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), or discrimination contrary to Title VII. *Albemarle Paper Company v. Moody*, ... U.S. ....., 45 L. Ed. 2d 280 (1975). The rationale for these decisions was the remedial purpose of making employees whole and restoring the economic status quo underlying both Title VII and the National Labor Relations Act. As the Court explained in *Albemarle*:

> "If back-pay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" 45 L.ed. 2d at 299.

Footnote Continued—

committed perjury when he swore to the earlier notarized statements pinning the blame on petitioners. The law recognizes the inherent reliability of such declarations against penal and pecuniary interest by rendering them admissible even as hearsay without cross examination. McCORMICK ON EVIDENCE, 670-679 (2d ed. 1972). Moreover in the instant case Pagano's first statement inculpating petitioners was simply a notarized declaration not subject to cross examination, while his later deposition exculpating petitioners was testimony subject to cross examination. Neither the cross examination of Pagano by all respondents nor any evidence submitted by them discloses any motive whatsoever for Pagano to give false testimony inculpating himself in three serious felonies.

The same "make whole" purpose underlies the damage remedies for breach of contract,[4] as made relevant to the enforcement of rights under collective bargaining agreements and given statutory status pursuant to L.M.R.A. §301. See *Textile Workers' Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Vaca v. Sipes*, 386 U.S. 171, 195-198 (1967).

Even if "good faith" were a ground for denying or mitigating back-pay damages, the very most that such rule could do for Anchor in the instant case would be to absolve it from back-pay liability for the period from the date of discharge to September 29, 1968, the date on which motel clerk Pagano *sua sponte* advised Anchor officials that petitioners were innocent of the dishonesty for which they had been discharged (R. 55-59, 275-279). Anchor did not offer to reinstate petitioners nor even to clear their good names for the record, but rather silently sent Pagano back to Batavia, New York, (withholding his testimony from the unemployment compensation hearing for which Anchor had brought him to Warren, Ohio[5] (R. 57-58, 275-276) and continued to resist petitioners' claim for unemployment compensation on the ground of their alleged dishonesty (Sandy Dep. II 82-94, Exs. L-3, L-5).

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4. This Court's articulation of the "make whole" principle in *Albemarle* was, in fact, taken verbatim from one of its early decisions in a breach of contract case:

> "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 6 Wall. 94, at 99, quoted in *Albemarle, supra*, 45 L. Ed. 2d at 297.

5. Anchor disingenuously characterizes this episode as "Because he changed his story Pagano was not required to testify in 'court.'" (Anchor Brief, p.10).

This egregious exhibition of *bad* faith on Anchor's part, when considered in light of the history of the Company's relationship with the union and with petitioners prior to discharge (see Petitioners' Brief, pp. 8-9), casts serious doubt on Anchor's bona fides *ab initio*.

Anchor's claim of having been vindicated in seven distinct adjudications of its discharge of petitioners (Anchor Brief, pp. 23-24) is false and misleading and constitutes, in its purest form, an attempt to pull itself up by its own boot straps. Of the seven cited instances, only the initial decision of the joint grievance committee (wherein petitioners were unfairly represented) purported to decide the merits of the discharge.[6] Equally spurious is Anchor's contention that the summary judgments below represent "concurrent findings of fact by two courts below" not subject to review by this Court except upon a "very obvious and exceptional showing of error," citing *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). (Anchor Brief, p. 24). By definition the summary judgment awarded Anchor and affirmed below was predicated upon a finding that there was "no genuine issue as to any mate-

6. In the second cited instance, the joint grievance committee denied petitioners' request for rehearing (R. 210-212), while the third, fourth and fifth instances involved different stages of the N.L.R.B. General Counsel's exercise of his "unreviewable discretion to refuse to institute an unfair labor practice complaint" held by this Court in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) to have no bearing on §301—breach of fair representation actions. Finally, the sixth and seventh instances were the decisions of the two courts below, each expressly declining to reach the merits of the discharge on the ground that they were barred by the original decision of the joint grievance committee.

In fact, the only reviewing agency other than the original joint grievance committee to have focused on the merits of the discharge, the Ohio Bureau of Employment Services, concluded that petitioners had not been discharged for just cause and, therefore, awarded unemployment compensation to petitioners Alban and Croft over the vigorous objections of Anchor (Sandy Dep. II 82-94, Exs. L-3, L-5).

rial fact," Rule 56 (c), F.R. Civ. P., and involved no taking of testimony or assessment of the credibility of witnesses upon which the rule in *Graver* is based.

Anchor's total disclaimer of responsibility for the harm suffered by petitioners will not wash in light of the fact that it was Anchor who granted exclusive control of the grievance procedure to the union in the collective bargaining agreement. See Article VII §9 (R. 233) and §5 (R. 231). Having vested total control of petitioners' grievance in the union, it ill behooves Anchor to disclaim responsibility for the union's abuse of that power and to seek to reap its benefits.[7] Cf. *Richardson v. Texas & N.O.R. Co.*, 242 F.2d 230, 235, 236 (5th Cir. 1957).

7. Anchor's claim of "harmless error" (Anchor Brief, pp. 25-28) is preposterous in the face of a record containing overwhelming evidence of petitioners' innocence (Petitioners' Brief, pp. 4-6). It is significant that on the very first occasion on which motel clerk Pagano was asked to testify before any body (on the petitioners' unemployment compensation claim by Anchor) (R. 55-59, 275) he admitted fault and exculpated petitioners. Even, if for some reason not explained by Anchor, fair representation could not have obtained this testimony for petitioners' grievance hearing, the statement of motel owner Repicci (R. 199-209) obtained for petitioners' request for rehearing of their grievance (but never considered on the merits) would, in all probability have changed the result. The Repicci statement, disclaiming any personal knowledge of the events in question, would have reduced the case against petitioners to the uncorroborated statement of Pagano, a witness with a substantial motive for falsely accusing petitioners. Such evidence would hardly have been sufficient to meet the high burden of proof required to sustain the extreme industrial penalty of discharge for wrongdoing. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS, pp. 621-623 (3d Ed. 1974).

These facts clearly demonstrate that the breach of fair representation had a probable impact on the outcome and distinguish the instant case from cases such as *Humphrey v. Moore*, 375 U.S. 335 (1964) where this Court observed:

> "[The employees] have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented. The trial court found it 'idle speculation to assume that the result would have been different had the matter been differently presented.' We agree." 375 U.S. at 350-351.

Moreover, Anchor's assertion that total relief can be obtained from the union (Anchor Brief, pp. 20-23) relies on cases which do not support it[8] and completely ignores the inability of the union to reinstate petitioners to their jobs or even to clear their employment records.

CONCLUSION

The foregoing reasons and authorities conclusively demonstrate that petitioners are entitled to a reversal of the summary judgment granted to Anchor Motor Freight and to a remand to the district court for trial of their wrongful discharge claim.

Respectfully submitted,

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8. In fact, *Butler v. Teamsters, Local 823*, ____ F.2d ____, 76 L.C. ¶10,739 (8th Cir. 1975) and *DeArroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (1st Cir. 1970) actually hold to the contrary for which they are cited. In *Butler*, the Court affirmed an award of compensatory damages of $28,000 against the employer and $6,500 against the union, specifically acknowledging that even an employer who has breached the contract in good faith "will be vulnerable if the union has acted unfairly." *Id.* at p. 18,514. In *DeArroyo*, the Court assessed all damages flowing from a wrongful discharge against the employer, notwithstanding that a statute of limitations immunized the union from liability for its unfair representation. Even *Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir. 1971) which at least talks about apportioning all liability for damages to the union, does so with respect to cases in which the union wrongfully induces the discharge, acknowledging it to be an exception to the general rule charging breach of contract damages exclusively to the employer.